REMARKS

This responds to the Office Action dated August 31, 2005.

Claim 22 was previously canceled, without prejudice to the Applicants. Claims 12 and 13 were identified as allowable if rewritten in independent format. As a result, claims 1-21 are presently pending in this application.

§103 Rejection of the Claims

Claims 1-2, 9-10 and 20-21 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kashyap (U.S. 2003/0014684) in view of Raman et al. (U.S. 6,910,078) and Webber (U.S. 2003/0039209). It is of course fundamental that in order to sustain an obviousness rejection that each and every element or step in the rejected claims must be taught or suggested in the proposed combination of references.

The Examiner has asserted, with this Final Action, that the Raman reference includes a teaching of a data structure, which includes application layer protocol identification. Applicants respectfully disagree with the current interpretation of Raman and with the application of Raman; accordingly, Applicants respectfully assert that Raman still fails to teach or suggest the limitation wherein a structure "includes an identification of an application layer protocol being used for communication by an application."

More specifically, the Raman reference is directed to detecting when a first media sever has trouble delivering a stream of content during midstream transmission of data associated with the stream. When a problem occurs, an offset within the content is communicated to a backup media server; the backup media server also includes a copy of the content. The backup media server continues to deliver the remaining portions of the content, beginning at the content's offset position, to a recipient who was downloading the content when the problem was experienced.

The Examiner cited a reference location of column 11 lines 21-36 for the proposition that Raman teaches identifying an application layer protocol within a data structure; such a limitation is positively recited in Applicants' independent claims. This referenced teaching fails to explain how Raman includes an identifier within a data structure to identify an application layer

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protocol. The teaching explains how the failover manager maintains a stream state for a transaction. Later in the reference, the stream state data structure is explained. Raman, col. 14, lines 2-14. There is no indication at all in Raman that the stream state includes an identifier for an application layer protocol.

In fact, the entire teaching of Raman assumes that the failover manager knows the protocol being used, which for the most part it is identified as being Real-Time Streaming Protocol (RTSP). One of ordinary skill in the art would have assumed, based on this lack of teaching, that the failover manager used runtime parameters or other configurations to identify the specific control protocol, which was being used with any given transmission. However, it is not reasonable to assume that such identification was embedded in the state stream because there is no indication of this and because the failover manager has already identified the control protocol and is already monitoring the control protocol before it even begins to assemble and maintain the stream state. So, there is no need for an identifier of the control protocol to appear in the stream state and one of ordinary skill in the art would not have seen a purpose in such an arrangement. Furthermore, such a purpose could have only been seen after reading and comprehending Applicants' invention and such a construction is considered improper hindsight and is not permissible.

Stated another way, Raman uses a failover manager to build and maintain stream states of content being delivered from one server to a requesting client. The stream state houses offsets to indicate the last portion of content delivered to the client. The failover manager begins to interact with the streaming protocol before it builds the stream states. This can only mean that the failover manger has already identified the streaming protocol; therefore, recording an identifier for the already identified protocol within the stream state is not logical within the context of the Raman teaching.

Thus, Applicants assert that Raman still fails to teach an identifier for an application layer protocol, which is included in a structure. This makes sense for Raman because Raman is directed to failover for a very specific type of network transaction (content streaming). So, making the protocol generic along with the state information was not necessary and was not done or addressed, because the protocol was assured to be a streaming protocol and one which could be identified with runtime options or configurations of the Raman failover manager. Conversely,

Applicants' failover techniques are directed to a more generic approach such that a specific protocol is not known in advance and can be obtained from a structure that also includes shared state information.

Therefore, Applicants respectfully assert that the Raman reference fails to teach that asserted limitation. Moreover, the Examiner has admitted that the Kashyap and Webber references fail to teach the asserted limitation. Accordingly, the rejection of the independent claims 1, 9, and 21 should be withdrawn and Applicants respectfully request an indication of the same.

Claims 8 and 19 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kashyap, Raman et al. and Webber in view of "Official Notice". Claim 8 is dependent from independent claim 1 and claim 19 is dependent from independent claim 9; therefore, for the remarks presented above with respect to claims 1 and 9, the rejections of claims 8 and 19 should be withdrawn.

Claims 3, 11 and 14 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kashyap, Raman et al. and Webber in view of Fisher (U.S. 5,828,569). Claim 3 is dependent from independent claim 1 and claims 11 and 14 are dependent from independent claim 9; thus, for the remarks presented above with respect to claims 1 and 9, the rejections of the claims 1, 11, and 14 should be withdrawn.

Claims 4 and 15 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kashyap, Raman et al., Webber and Fisher in view of "Official Notice". Claim 4 is dependent from independent claim 1 and claim 15 is dependent from independent claim 9; accordingly, for the remarks presented above with respect to claims 1 and 9, the rejections of the claims 4 and 15 should be withdrawn.

Claims 5-7 and 16-18 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kashyap, Raman et al., Webber and Fisher in view of "Official Notice" as applied to claims 4 and 5 above, and in further view of Syvanne et al. (U.S. 2002/0112189). Claims 5-7 are

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dependent from independent claim 1 and claims 16-18 are dependent from independent claim 9; therefore, for the remarks presented above with respect to the claims 1 and 9, the rejections of the claims 5-7 and 16-18 should be withdrawn.

Allowable Subject Matter

Claims 12 and 13 were objected to as being dependent upon a rejected base claim, but were indicated to be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Applicants acknowledge and appreciate the Examiner's indication that claims 12 and 13 are allowable in view of the art of record if rewritten in independent format. However, Applicants believe that this is unnecessary in view of the remarks presented herein.

CONCLUSION

Applicants respectfully submit that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicants' attorney (513) 942-0224 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.
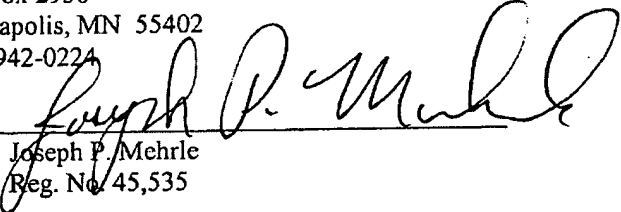
Respectfully submitted,

HILARIE K. ORMAN ET AL.
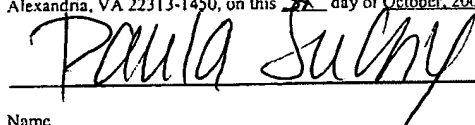
By their Representatives,

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Date _____10-31-05_____   By _____
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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: Mail Stop AF, Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this ___ day of October, 2005.

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